STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MICHAEL CRANDELL, Charging Party, v. SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1021, Respondent.	Case No. SF-CO-204-M PERB Decision No. 2169-M February 25, 2011

Appearances: Michael Crandell, on his own behalf; Weinberg, Roger & Rosenfeld by Kerianne R. Steele, Attorney, for Service Employees International Union, Local 1021.

Before Dowdin Calvillo, Chair; McKeag and Wesley, Members.

DECISION

DOWDIN CALVILLO, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Michael Crandell (Crandell) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that Service Employees International Union, Local 1021 (SEIU) breached its duty of fair representation under the Meyers-Milias-Brown Act (MMBA)[1] when it failed to grieve or arbitrate Crandell's termination, and failed to represent him in a civil service commission hearing. The Board agent dismissed the charge for failure to state a prima facie case; she also dismissed other allegations in the charge as untimely.

The Board has reviewed the dismissal and the record in light of Crandell's appeal, SEIU's response thereto, and the relevant law. Based on this review, the Board finds the Board agent's warning and dismissal letters to be well-reasoned and in accordance with

[1] The MMBA is codified at Government Code section 3500 et seq.

applicable law. The Board therefore adopts them as the decision of the Board itself, as supplemented by the discussion below.

DISCUSSION

The Board agent's warning letter set out the deficiencies in Crandell's charge and gave him until May 14, 2010 to file an amended charge. When the Board agent did not receive an amended charge by that date, she dismissed the charge.

On appeal, Crandell contends the Board agent should not have dismissed his charge because he was not provided sufficient time to file an amended charge. The Board agent's warning letter was mailed to Crandell on May 4, 2010. According to his appeal, the warning letter "was not delivered or received by 5/7/10, and was only retrieved on 5/14/10, the date of dismissal suggested in the Warning Letter." Crandell does not allege that the letter did not arrive at his post office box until May 14, 2010, and does not explain why he could not have retrieved it from his post office box before that date. A party's unexplained delay in retrieving a warning letter from a post office box does not extend the time for filing an amended charge. (*National School District* (2010) PERB Order No. Ad-389.) Thus, Crandell was required to file his amended charge by May 14, 2010, as stated in the warning letter, and his failure to do so resulted in a proper dismissal of his charge.

Additionally, PERB Regulation 32132(b) allows a party to request an extension of time to file any document with a Board agent.[2] Crandell's appeal indicates that he was aware Board agents could grant a party an extension of time for filing. Had he retrieved the warning letter before May 14, 2010, he could have requested an extension of time to file his amended charge.

Crandell also requests that the Board accept his amended charge, which was filed with PERB's San Francisco Regional Office on June 10, 2010. PERB Regulation 32621 allows a

[2] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

charging party to file an amended charge at any time "[b]efore the Board agent issues or refuses to issue a complaint." PERB Regulation 32136 states that "[a] late filing may be excused in the discretion of the Board for good cause only." Thus, an amended charge filed after the charge has been dismissed is untimely unless good cause is shown. (*Sacramento Municipal Utility District* (2006) PERB Decision No. 1838-M.) Crandell has provided no reasonable and credible explanation why he could not have retrieved the warning letter and filed an amended charge by the due date. Therefore, we decline to excuse Crandell's late-filed amended charge.

ORDER

The unfair practice charge in Case No. SF-CO-204-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Wesley joined in this Decision.

STATE OF CALIFORNIA
ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1021
Fax: (510) 622-1027

May 25, 2010

Michael Crandell
P. O. Box 423803
San Francisco, CA 94142

Re: *Michael Crandell v. SEIU Local 1021*
Unfair Practice Charge No. SF-CO-204-M
DISMISSAL LETTER

Dear Mr. Crandell:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 18, 2009. Michael Crandell (Crandell or Charging Party) alleges that SEIU Local 1021 (SEIU or Union or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)[1] by failing to adequately represent him with respect to a grievance and arbitration.

Charging Party was informed in the attached Warning Letter dated May 4, 2010, that the above-referenced charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, the charge should be amended. Charging Party was further advised that, unless the charge was amended to state a prima facie case or withdrawn prior to May 14, 2010, the charge would be dismissed.

PERB has not received either an amended charge or a request for withdrawal. Charging Party has not provided a telephone number and therefore PERB is unable to confirm with Charging Party that no amended charge has been sent. Therefore, the charge is hereby dismissed based on the facts and reasons set forth in the May 4, 2010, Warning Letter.

Right to Appeal

Pursuant to PERB Regulations,[2] Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs, tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

[1] The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

[2] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs, tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs, tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs, tit. 8, § 32635, subd. (b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs, tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs, tit. 8, § 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

TAMI R. BOGERT
General Counsel

By _____
Laura Davis
Regional Attorney

Attachment

cc: Vincent Harrington, Jr., Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1021
Fax: (510) 622-1027

May 4, 2010

Michael Crandell
P. O. Box 423803
San Francisco, CA 94142

Re: *Michael Crandell v. SEIU Local 1021*
Unfair Practice Charge No. SF-CO-204-M
WARNING LETTER

Dear Mr. Crandell:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 18, 2009. Michael Crandell (Crandell or Charging Party) alleges that SEIU Local 1021 (SEIU or Union or Respondent) violated the Meyers-Milias-Brown Act (MMBA or Act)[1] by failing to adequately represent him with respect to a grievance and arbitration.

Summary of Facts

It appears that Crandell was employed by the City and County of San Francisco (City) and it is assumed that he was a member of a bargaining unit exclusively represented by SEIU.

The statement of the charge alleges, in substantive part, verbatim, as follows.

> Failure to represent the charging party (a benefits technician functioning above-class as a workers-compensation claims-examiner) by SEIU Local 1021 representatives including Keith Snodgrass (SEIU 1021 Field Representative) and Jett Chapman (SEIU 1021 Supervisor).
>
> SEIU Local 1021 representatives did not grieve or arbitrate the suspension of 10/3/08, did not grieve or arbitrate the termination of 12/19/08, did not provide representation to advocate continued employability at the Civil Service Commission meeting of 4/20/09, would not pursue grievance or arbitration of the 9/10/08 grievance regarding camera-phone stalking or insure protection against the latter practice, and would not oppose the administratively declared policy of overassignment by City and

[1] The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

> County of San Francisco, Human Resources and Workers Compensation administrative staff. Telephone calls to the above representatives were not returned during 2009. (One may refer to the corresponding Unfair Practice Charge of 6/18/09 against the City and County of San Francisco regarding wrongful termination and suspension, and the Unfair Practice Charge of 6/8/09 against the City and County of San Francisco and SEIU Local 1021 regarding camera-phone stalking. [sic]

Statement of Charge

PERB Regulation 32615(a)(5)[2] requires that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

The charge appears to attempt to incorporate by reference allegations of three other charges: (1) Charge Number SF-CO-202-M (*Crandell v. SEIU*); (2) Charge Number SF-CE-665-M (*Crandell v. City and County of San Francisco*); and (3) Charge Number SF-CE-671-M (*Crandell v. City and County of San Francisco*). Allegations of fact must be contained in the statement of the charge, and in attachments to the charge. (*Monrovia Unified School District* (1984) PERB Decision No. 460.) Under this rule, it logically follows that allegations of fact may not be contained in documents filed with PERB in connection with other unfair practice charges. (See, e.g., *County of San Joaquin* (2004) PERB Decision No. 1600-M [charge attempting to incorporate by reference the findings of a mediator's report does not contain a "clear and concise" statement of the facts].) Therefore, these allegations will not be considered with respect to the analysis of the instant charge.

Statute of Limitations

The charging party's burden also includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of

[2] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.)[3] A charging party bears the burden of demonstrating that the charge is timely filed. (*State of California (Department of Insurance)* (1997) PERB Decision No. 1197-S.; *Tehachapi Unified School District* (1993) PERB Decision No. 1024.)

In *Saddleback Valley Unified School District* (1985) PERB Decision No. 558, the Board held that the six months statute of limitations period provided by the Educational Employment Relations Act "is to be computed by excluding the day the alleged misconduct took place and including the last day." Thus, where the school employer adopted a proposal on June 20, 1984, the Board calculated that "the six-month period started on June 21, 1984, the day after the school board adopted the proposal, and ended at the close of business on December 20, 1984." (*Ibid.*; see also *California State University, Fullerton* (1986) PERB Decision No. 605-H.) The same method of calculation should be applied to the statute of limitations under the MMBA. (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072.)

The instant charge was filed on June 18, 2009. Therefore, allegations occurring prior to December 18, 2008, are untimely. Accordingly, Crandall's allegation that SEIU Local 1021 representatives did not grieve or arbitrate the suspension of October 3, 2008, appears untimely and cannot be the basis for a prima facie case. For the same reason, Crandall's allegation that SEIU would not pursue his September 10, 2008, grievance regarding camera-phone stalking, or arbitrate the grievance, is likewise untimely and does not state a prima facie case.

Duty of Fair Representation

While the MMBA does not expressly impose a statutory duty of fair representation upon employee organizations, the courts have held that "unions owe a duty of fair representation to their members, and this requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad faith." (*Hussey v. Operating Engineers* (1995) 35 Cal.App.4th 1213.) In *Hussey*, the court further held that the duty of fair representation is not breached by mere negligence and that a union is to be "accorded wide latitude in the representation of its members . . . absent a showing of arbitrary exercise of the union's power."

In *International Association of Machinists (Attard)* (2002) PERB Decision No. 1474-M, the Board determined that it is appropriate in duty of fair representation cases to apply precedent developed under the other acts administered by the Board. The Board noted that its decisions in such cases, including *Reed District Teachers Association, CTA/NEA (Reyes)* (1983) PERB Decision No. 332 and *American Federation of State, County and Municipal Employees, Local 2620 (Moore)* (1988) PERB Decision No. 683-S, are consistent with the approach of both *Hussey* and federal precedent (*Vaca v. Sipes* (1967) 386 U.S. 171).

[3] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

With regard to when "mere negligence" might constitute arbitrary conduct, the Board observed in *Coalition of University Employees (Buxton)* (2003) PERB Decision No. 1517-H that, under federal precedent, a union's negligence breaches the duty of fair representation "in cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." (Quoting *Dutrisac v. Caterpillar Tractor Co.* (9th Cir. 1983) 749 F.2d 1270, at p. 1274; see also, *Robesky v. Quantas Empire Airways Limited* (9th Cir. 1978) 573 F.2d 1082.)

Thus, in order to state a prima facie violation of the duty of fair representation under the MMBA, a charging party must at a minimum include an assertion of facts from which it becomes apparent in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (*International Association of Machinists (Attard)*, *supra*, PERB Decision No. 1474-M.) The burden is on the charging party to show how an exclusive representative abused its discretion, and not on the exclusive representative to show how it properly exercised its discretion. (*United Teachers – Los Angeles (Wyler)* (1993) PERB Decision No. 970.)

Crandell alleges that SEIU did not grieve or arbitrate his termination, which occurred on December 19, 2008. A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. (*United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258.) Crandell does not allege any facts to suggest that SEIU arbitrarily ignored his grievance. Therefore, this allegation does not state a prima facie case.

Crandell further alleges that SEIU did not represent him before a Civil Service Commission meeting on April 20, 2009. A union's duty of fair representation does not extend to a forum over which the union does not control the exclusive means to a particular remedy. (*Alameda County Probation Peace Officers Association (Huntsberry)* (2004) PERB Decision No. 1709-M.) Unions generally do not owe a duty of fair representative with respect to an extra-contractual forum such as a civil service commission. (*SEIU Local 1021 (DeLarge)* (2009) PERB Decision No. 2068; *California School Employees Association & its Chapter 130 (Simpson)* (2003) PERB Decision No. 1550.) Crandell does not allege any facts to establish that he could not represent himself before the Civil Service Commission, nor does he allege any facts that would show that SEIU had a duty to represent him before the Civil Service Commission. Therefore, Crandell's allegation regarding the Civil Service Commission meeting on April 20, 2009, does not state a prima facie case.

Unilateral Change

In determining whether a party has violated Government Code section 3505 and PERB Regulation 32603(c), PERB uses either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (*Stockton Unified School District* (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer

implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (*Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802; *Walnut Valley Unified School District* (1981) PERB Decision No. 160; *San Joaquin County Employees Association v. City of Stockton* (1984) 161 Cal.App.3d 813; *Grant Joint Union High School District* (1982) PERB Decision No. 196.)

Crandell also alleges that SEIU "would not oppose the administratively declared policy of overassignment by City and County of San Francisco, Human Resources and Workers Compensation administrative staff." It appears from this that Crandell may be attempting to allege that the City made an unlawful unilateral change in the way it assigned staff in the Workers Compensation division. However, Crandell, an individual employee, does not have standing to allege a unilateral change violation on behalf of the Union. (*City of Long Beach* (2008) PERB Decision No. 1977-M.) Therefore, this allegation also does not state a prima facie case.

For these reasons the charge, as presently written, does not state a prima facie case.[4] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with

[4] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

PERB. If an amended charge or withdrawal is not filed on or before May 14, 2010[5] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Laura Davis
Regional Attorney

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[5] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)